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NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

Report of the Working Group

I. INTRODUCTION

1. At its 2530th meeting, on 14 May 1998, the International Law Commission established a Working Group on the topic "Nationality in relation to the succession of States" under the chairmanship of Mr. Václav Mikulka, Special Rapporteur, 1/ to consider the question of the possible orientation to be given to the second part of the topic dealing with the question of the nationality of legal persons in order to facilitate the Commission's decision on this issue.

2. The Working Group held two meetings, on 14 May and 2 June 1998. It agreed on a number of preliminary conclusions presented in section II below.

II. PRELIMINARY CONCLUSIONS OF THE WORKING GROUP

3. The second part of the topic "Nationality in relation to the succession of States" includes the problem of the nationality of legal persons that the

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1/ The Working Group was composed as follows: Mr. Václav Mikulka (Special Rapporteur, Chairman of the Working Group); Mr. Emmanuel Akwei Addo; Mr. Husain Al-Baharna; Mr. Ian Brownlie; Mr. Enrique J.A. Candioti; Mr. Christopher John Robert Dugard; Mr. Constantin P. Economides; Mr. Zdzislaw Galicki; Mr. Gerhard Hafner; Mr. Teodor Viorel Melescanu; Mr. Igor Ivanovich Lukashuk; and Mr. Robert Rosenstock.

Commission has not yet studied. In the view of the Working Group, as the definition of the topic now stands, the issues involved in the second part are too specific and the practical need for their solution is not evident. In addition to considering the possibility of suggesting to the Commission not to undertake work on this part of the topic, the Working Group considered it useful to examine the possibility of alternative approaches, as they emerge from Part III of the Fourth report of the Special Rapporteur (document A/CN.4/489). It agreed that there are, in principle, two options for enlarging the scope of the study of problems falling within the second part of the topic, as explained below. They would both require a new formulation of the mandate for this part of the topic.

1. Nationality of legal persons in international law

4. The first option would consist in expanding the study of the question of the nationality of legal persons beyond the context of the succession of States to the question of the nationality of legal persons in international law in general. As the notion of the nationality of legal persons is not known to all legal systems, it would be advisable that the Commission examine also similar concepts on the basis of which the existence of a link analogous to that of nationality is usually established.

5. The benefits of such an approach would be, in the view of the Working Group, that it would contribute to the clarification of the general concept of the nationality of legal persons in international relations. It would also enable the Commission to further consider in a more systematic manner the problems it has been confronted with when studying the topics of State responsibility, Diplomatic protection and Succession of States.

6. The problems that the Commission could encounter, in opting for this approach, would be the fact that, due to the wide diversity of national laws in this respect, the Commission would be confronted with problems similar to those that have arisen during the consideration of the topic of Jurisdictional immunities. There would also be a certain overlap with the topic of Diplomatic protection. Moreover, such study would lend itself to a more theoretical analysis than to the development of rules of immediate practical applicability. But above all, the enormity of such a task should not be underestimated. It would be difficult to keep the study within manageable

2. Status of legal persons in relation to the succession of States

7. The second possibility would consist in keeping the study within the context of the succession of States, but going beyond the problem of nationality to include other questions, such as the status of legal persons (in particular rights and obligations inherent to the legal capacity of legal persons, including those determining the type of legal person etc.) and, possibly, also the conditions of operation of legal persons flowing from the succession of States.

8. The benefits of such an approach would be, in the view of the Working Group, that it would contribute to the clarification of a broader area of the law of the succession of States.

9. The problems that the Commission could encounter, in opting for this approach, would be the fact that the Commission would be confronted with the wide diversity of national laws in this respect. Once enlarged in this direction, it would, moreover, be difficult to establish a new delimitation of the topic.

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10. If work is continued, the Commission has further to decide which categories of "legal persons" should be covered by the study, to which legal relations the study should be limited and what could be the possible outcome of the work of the Commission on this part of the topic.

11. In the absence of positive comments from States, the Commission would have to conclude that States are not interested in the study of the second part of the topic. The Commission should, in its report, remind the General Assembly of the desirability of obtaining the reaction of States on the question asked in paragraph 5 of General Assembly resolution 52/156 of 15 December 1997. The Assembly should, in particular, invite States having undergone a succession of States, to indicate, e.g., how the nationality of legal persons was determined, what kind of treatment was granted to the legal persons which, as a result of the succession of States became "foreign" legal persons, etc.